United States Court of Appeals

for the Second Circuit

APPELLANT'S BRIEF

B/S

75-1309

To be argued by
PHYLIS SKLOOT BAMBERGER

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

UNITED STATES OF AMERICA,

Appellee,

-against-

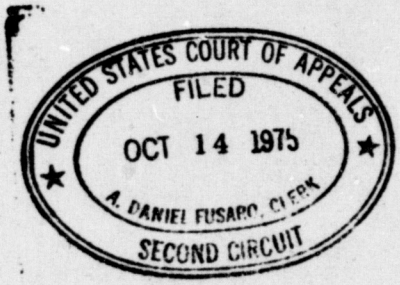
GEORGE GALGANO and VICTOR LEO,

Appellants.

Docket No. 75-1309

BRIEF FOR APPELLANT
GEORGE GALGANO

ON APPEAL FROM A JUDGMENT
OF THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK



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FOR THE SOUTHERN DISTRICT OF NEW YORK

QUESTION PRESENTED

Whether it was error for the district court to deny the motion to dismiss the indictment for pre-accusatory delay.

STATEMENT PURSUANT TO RULE 28(a)(3)

Preliminary Statement

This appeal is from a judgment of the United States District Court, Southern District of New York (The Honorable Morris E. Lasker) rendered on August 4, 1975, convicting appellant of use of extortionate means to collect a debt [18 U.S.C. §894 (a)(1)]and sentencing him to a term of five years, to serve a period of six months incarceration with the remainder to be served on probation.

The Legal Aid Society, Federal Defender Services Unit was assigned as counsel on appeal.

Statement of Facts

Introduction

Appellant and Victor Leo were charged with using extortionate means to collect legitimate debts from Bruno Zaffino (Bruno), Florenz De Raffele (Florenz), and Clementine De Raffele (Clementine). Bruno and Florenz had incurred debts in their construction business and appellant was a creditor. The Government asserted appellant, Leo, and another man named David Grande used threats of injury to property and person

to get the money. The defense was that Bruno was in such substantial financial difficulty that he fabricated the story of the threats to get financial help from his family and cause other creditors to delay their demands.

Pretrial Motions

Prior to trial, defense counsel made a motion to dismiss the indictment based on pre-indictment delay. Based on the affidavits, Judge Lasker held a hearing to determine the cause of the delay and whether prejudice had resulted.

At the proceedings, counsel made clear that the motion was being made under the constitution, the court's supervisory power and Rule 48(b)(12).**

The testimony showed that the matter first came to the attention of the FBI in September, 1971, and the first report was submitted in January, 1972 (116). FBI agent Walsh contacted a man named Ruggiero through a confidential informer who had said that Bruno Zaffino had been terrorized to get certain money (125). Walsh interviewed Bruno and Clementine De Raffele (128). Assistant United States Attorney Elliot Sagor was assigned to the case early in January, 1972* and he transferred it in March, 1973 (16). In that period he reviewed the file and in-

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* Grande died on April 14, 1971 (31) and thus, was deceased by the time the case got to the prosecutor

** In this section of the brief, numerals are references to the minutes of the pre-trial hearing on May 12-13, 1975.

vestigative reports, conferred with the agents, the local District Attorney, and did some legal research. He did not present the case to the grand jury because it needed more investigation (16) by the FBI (17), interviewing of witnesses to firm up their testimony (48) and documentation (18, 38), especially with regard to the debts and repayment (35, 48). Sagar did not have time to do this himself (18). Although he acknowledged that he should have interviewed the witnesses (39), he felt that some additional proof was obtained by the agents in this period (50). However, he could not recall in what way specifically the case did improve (52).

Assistant United States Attorney Peter Truebner was assigned the case from March, 1973, through July 1, 1974 (66). He did no work until the summer of 1973(74) and in August, 1973, he interviewed a prospective witness but was still not satisfied with the factual evidence of the transaction (67). He tried to get documentary evidence but learned by September, 1973, that the papers were unavailable. He did no work on the case from January, 1974 (68). Mr. Truebner explained:

> . . . I might have been partially at fault that I didn't sit down and, you know, make a concentrated effort to see exactly what we had and what we didn't have about that time. But I still felt the case was deficient for the reasons that I indicated earlier.

QUESTION: And that was around the end of '73; is that correct?

ANSWER: That's correct. Yes, I really had a number of trials at that time so I can't represent that I did anything at all say, in December of 1973. So it really would be a little earlier.

QUESTION: Did you at that point realize that your schedule did not permit you to continue the investigation and request that the case be assigned to somebody?

ANSWER: No, I did not.

QUESTION: You just let the case lay dormant; is that correct?

ANSWER: Yes. . . .

(Court Transcript, May 13, 1975, Page 88, line 9-24)

He felt the case was not in condition to go to trial (97).

Assistant United States Attorney George Wilson was assigned on July 1, 1974, and the indictment was filed in February, 1975 (169). Wilson did no work on the case until January, 1975, when he asked Walsh to verify certain things for him (171). Wilson subpoenaed the files of appellant's attorney, Castiglia, and considered adding other potential defendants (174).

The Defense claimed that the death of Ruggiero, in July, 1974, was prejudicial since he was the person who brought the case to the attention of the prosecutor and might have had exculpatory information (106, 107) or information which affected

the credibility of the government witnesses (109).

At the conclusion of the hearing, Judge Lasker ruled there was no bad faith on the part of the Government in causing the delay (200) although there were long periods in which no action was taken (205). He denied the motion without prejudice to renew at the end of trial on a showing of actual prejudice to the appellant (205).

The Trial

A. The Businesses

Bruno and his brothers Vincent, Angelo and Salvatore ran the family steel fabricating company (27) ** called G. Zaffino and Sons, Inc.(G. Zaffino), located at New Rochelle (92). Each brother was a twenty-five percent shareholder and an officer of the corporation (90-91). However, the business was run by Bruno and he kept books and records (1408-9). The company maintained its bank account at the National Bank of Westchester (102).

Early in 1969 (28) Bruno and his nephew Florenz De Raffele (Florenz) went into the construction business forming over a period of time several corporations including the Covair Construction Company, Edgemont Builders* and Park Terrace

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* Edgemont was a general contractor (28) who also built an apartment house at 140 Grace Church St. (29). Edgemont had nothing to do with G. Zaffino and Sons, Inc. (89).

** Numerals are references to the minutes of trial.

Apartment's (28).* The business was run by Florenz, and Bruno was an investor who occasionally checked at the firm's office (29).

Florenz met appellant in 1968 (400) in the purchase of an apartment building and its mortgage (370, 401). Florenz also used the services of appellant, through the Galgano Realty Company (30), to obtain mortgages (31, 370, 405). For these services, appellant received a commission (30).

On Novemeber 21, 1968, Florenz and Bruno also opened a second bank account under the name of G. Zaffino and Sons, Inc. at the First National Bank of Westchester (104, 408, 1378) for purposes of receiving the proceeds of a mortgage for a real estate venture at 140 Grace Chuch Street property (95, 407, 431). For purposes of this venture, the officers of G. Zaffino were Bruno (President) and Florenz (Assistant Secretary) (91, 103, 406, 1378). This was the only real estate project involving G. Zaffino (101). Bruno claimed that his brothers had given him permission to use the corporation (101, 407) although the brothers were not involved (104) and the project was not otherwise connected with G. Zaffino (104). Bruno was not sure his brothers knew that Florenz was listed as Secretary (104).** In contrast to Bruno's testimony, Angelo Zaffino

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* Park Terrace was to build a 51 story family apartment building but due to financial problems was unable to build it (29).

** Corporate records support this, since the bank account form for the special account shows that although Angelo was supposed to sign, he did not (1378).

testified that he thought he did not learn of the bank account until 1973, and that he did not recall authorizing the bank account (1380-1).

B. The Loans

By the end of 1969 and early 1970, the construction firms owned by Bruno and Florenz were in substantial general indebtedness, (33, 375, 431, 432), and owed appellant a large amount of money. The debts, conceded by the Government as legitimate ones (991, 1693)* included:

1. $8,400 borrowed from Barbara Galgano to pay a mortgage commitment on Park Terrace Apartment (106, 108, 415, 1148).

2. $2,000 note dated November 3, 1969, drawn on G. Zaffino and Sons, Inc., and signed by Florenz (Defendant's Exhibit A) given Galgano (110-111, 214) (two checks involved in an attempt at repayment).

3. $10,000 loan from Galgano (109, 413, 1147).

4. $30,000 mortgage on Flora Manor property (415, 1141, 1146).**

5. $15,000 mortgage executed by Bruno in July, 1969, the G. Zaffino and Sons, Inc. property at Halstead Ave. (112, 117, 415, 1141). This mortgage was given without the consent of the other three Zaffino brothers (126).***

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* Despite the Judge's finding implicit in the admission of the evidence of that indebtedness that it was relevant, at least as to credibility, the Assistant United States Attorney argued in summation that it was totally irrelevant (1726) although acknowledging that the key to this case was credibility.

** The money was still owed.

*** This property was the subject of a foreclosure action (116, 125).

6. Assorted loans, debts and bounced checks (Government Exhibit 12-16) (1148-1149) demonstrating an indebtedness of almost $15,000 (1249, 1157-8).

Adding to the difficulties, in late 1969, Florenz became ill with encephalitis and was hospitablized for seventy days and then required out-patient therapy (33, 370, 371-2). Bruno tried to run the corporations (33).

C. Appellant Deals with his Debts

In May, 1970, Bruno went to his attorney, Fernando Castiglia, and asked that Castiglia assist in the collection of some of the debts (1074, 1154). In June, Castiglia served a summons on G. Zaffino and Sons, Inc., Bruno, and Florenz (1077), to begin a suit on the $2,000 note, and the $10,000 note (1155, 1156, 1248, 128, 140-1).

Other debts, totallying about $15,000 were sold to David Grande, the bartender at the Halstead Inn, for $3,000 (1158, 1159, 1249, 1251, 1279).

1. Bruno and his Brothers

The defense theory of the case was that there had been no threats by appellant; that Bruno, without the authorization or knowledge of his brothers, had pledged and used the credit and assets of the successful G. Zaffino and Sons, Inc.,

business to bolster the seriously indebted construction ventures. To vindicate his wrongful actions and to get assistance from his brothers, Bruno fabricated the story of the threats (See 1479). However, he revealed it to enough people so that one of these eventually reported it to the FBI.

In support of this theory, it was elicited that Bruno did not reveal the financial situation to his brothers until May, 1970 (326, 327) and that Bruno pretty much controlled the business.

In an attempt to support the defense theory, Angelo Zaffino was called as a witness. However, he could not recall any relevant information: when Bruno ceased to be an officer (1368); when the second bank account (with Bruno and Florenz) was opened (1377); whether there was a meeting authorizing this second account (1380); when he learned of the second account (1381-2); anything about the payments to Clementine (1398); the attachment of the main G. Zaffino bank account (1405), or anything about July 17, 1970 (1409). Bruno's motives were so questioned that the Court permitted the Government to introduce evidence of his reputation for truthfulness through his attorney, Mr. Silberkliet (1609, 1612-3). But, Mr. Silberkliet was unaware of certain facts including the existence of federal tax liens which he said might cause him to reconsider his opinion (1628).

2. July 17, 1970 - Government Version

According to Bruno, on about July 17, 1970, Florenz, appellant and he met with Bruno's attorney, Warren Silberkliet (37, 376). At that time appellant told the others that he had sold some of their notes (35, 379) to Victor Leo* (36) and David Grande (38) and that these two men were going to get their money (39). On the other hand, Florenz testified he did not recall learning of the sale of the notes (420), and said the meeting was about the $30,000 mortgage (418).

Appellant introduced Bruno and Florenz to Leo in the lobby of the office building. Bruno testified that at some point appellant said that Grande and Leo were strong-arm men and that Bruno and Florenz had better pay (39).

Appellant and Bruno went to the Hall of Records and then to the Halstead Inn (40, 426)

Leo and Florenz went directly to the Halstead Inn (39, 377, 379). Grande was tending bar (40). At some time while at the Inn, appellant referred to the money (384). Florenz could not remember the circumstances or the words used (384). Appellant was walking back and forth from Florenz' table (382). Florenz was at the Inn about four or five hours (382).

* During trial the witnesses identified Leo as a man they knew as Victor Bianco (37, 377). The identification was challenged, but sustained.

Florenz testified appellant never threatened him and he was not afraid of appellant (445, 493). He explained he was afraid because the selling of notes under these circumstances meant a problem. He also heard of the past reputation of Grande (38, 387, 488, 526).

A while after the arrival of Leo and Florenz at the Inn, appellant and Bruno arrived (38). Bruno spoke to Grande at the bar (382) and they discussed the debts (52). Bruno testified he was frightned because Grande took from beneath the bar a gun which he placed on top of the bar (53, 273), pointing toward Bruno (55). He then replaced it underneath the bar (53). During this event, appellant was standing at the end of the bar, laughing and giggling.

Bruno then left the car (55) and went back to his shop to try to raise the money (56) through his brothers (56-57). Bruno did not call the police (196).

Then Florenz and Leo left the bar and drove to see Louis Ruggiero (391), a man who had previously lent Florenz money (392, 500, 506). Flornz asked to borrow $5,000 (392), but Ruggiero refused (393). Leo and Florenz returned to the Inn (393). Ruggiero died before trial, and was not available to the defense.

Larry Perone, an old friend of Florenz (394) in the company of Richard Donahue, telephoned Bruno at his stop to find out where Florenz was.* Bruno told Perone "they were holding Florenz at the Halstead Inn" (56, 279, 755). Perone and Donahue proceeded to the Inn (394, 638, 755). Donahue saw Florenz sitting with appellant and Leo (756). Donahue testified that he and Perone siad they had come to take Florenz (758) and that Leo said he wasn't leaving because he owed money (758).

Perone and Florenz went to the men's room and there Florenz said "he was being held in reference to some money" (394, 503, 656, 759).

The discussants then adjourned to the kitchen (397, 510, 796). Florenz recalled that he, Perone, and Leo were in the kitchen (395). Perone did not say appellant was present (642); and Florenz was not sure (724-5). Donahue did state that appellant was present (761, 792). Appellant said nothing (761). Grande entered later (642, 761, 797). Donahue recalled Grande pointed a gun at him (645, 762); Florenz said the gun (396) was on him and Grande told him to pay up or else (396). They disputed whether Florenz would be allowed to leave (644).

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* Donahue testified that call was made from Perone's home (844-5), but other evidence showed Perone had no telephone (569, 606).

Donahue told Grande to put the gun away (762) and Donahue and Perone said they'd get the money in a week. On their way out, Perone and Donahue stopped to get a drink at the bar (762, 807, 808).

Cross-examination of Perone and Donahue revealed that in pre-trial statements to the FBI and the Assistant United States Attorney as well as in a taped interview with a defense investigator (686, 698, 786, 833, 770), they had not mentioned the gun (648, 720-1).

After the alleged kitchen meeting, Perone and Donahue left the Inn with Florenz (397) and went to Perone's where Florenz had been recuperating ( ).*

Perone called Clementine De Raffele (Clementine), Florenz' mother, told her what happened at the Inn, and that Florenz had been released (566, 568). Clementine then called appellant and asked why he was keeping Florenz at the Inn; that if money were owed, he was sure to get paid (542). Appellant explained the matter was out of his hands and said the people to whom he had sold the notes would speak to her if she wanted. Appellant, Leo and Grande came to her home that evening (542).

Grande demanded the money (543). Clementine suggested some sort of arrangement for payments (543). Grande agreed

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* Despite the testimony that Florenz had been at Perone's house before July 17 for recuperation, the Assistant United States Attorney argued in summation that Florenz was at Perone's to hide (1705).

(544) to one month (581). Appellant said nothing (545).

Later Bruno told her he had been threatened (583).

Bruno testified that on the night of July 17, he received endless calls from Grande and Leo, whose voices Bruno says he recognized, saying Bruno should pay the money or else they would blow his head off or blow the shop off the earth (59-60, 281).

Around July 24, 1970, Leo picked up Bruno and took him to see Grande (62) at the Halstead Inn (63), and they discussed the money. After they left the Inn, Leo and Bruno entered the car and,while in the car with its doors and windows closed, Leo fired a shot from a gun held in his right hand (300) into the floor of the car. Bruno said he had a clear view of Leo's hand and did not notice anything unusual (306).* The shot sounded like a cannon and frightened Bruno (64).

According to Bruno, a few days later, while driving home from work, his car was stopped and Grande and Leo entered from each side of the car and told Bruno to pull over (65). At first Bruno testified that Grande sopke of money and threats (66). Later, however, Bruno testified they said only that they wanted their money (296).**

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* A doctor testified that Leo could not shoot a gun with his right hand because of an injury. FBI Agent Walsh gave testimony in an attempt to rebut this. Leo was acquitted of the charge in the indictment based on this event.

** Even in face of this testimony the Assistant United States Attorney argued in summation that there were threats made at this time (1706A).

About a week after her meeting with Grande and Leo, for about three or four nights (547), Clementine received about four telephone calls (546, 584), the last coming after midnight (547). A voice, unknown to Clementine, said "you will have to get it or you know what we will do" (549).* She said the voice said they did not want to wait a month (585).

Shortly after, Clementine and the brothers made arrangement to pay the debts (67, 116).

3. July 17, 1970 - Defense Version

Appellant testified that on July 17, 1970, there had been a meeting at Bruno's lawyer's (1168) office where they had discussed the imminent foreclosure on the $30,000 mortgage (1168) and the financial situation. Indeed, the Government's own case showed that on July 17, appellant had to sign an affidavit concerning the default judgment (1080). Burno and Florenz told appellant they had some money to pay, if Castiglia would end the law suit. With respect to the other debts, appellant told Bruno and Florenz the notes had been sold and they should see David Grande. They asked appellant to arrange a meeting (1174).

Later, at the county clerk's office, Bruno acknowledged that he really could not pay the money (1177, 1271).

Appellant went to Inn, and there told Florenz that

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* Despite the unequivocal testimony of Clementine that she did not know the voice, the Assistant United States Attorney in his summation argued that Clementine identified it as Grande or Leo (1703).

since Bruno said they couldn't pay, he was going to tell Castiglia to resume the legal proceedings (1183).

Appellant testified that a few days later, Celmentine call him at home expressing concern about the debt, saying she knew Grande owned the paper and asked if she could see him (1187-8). A meeting was set at Clementine's home with appellant, Grande and Leo (1190). Florenz was also there (1191). Appellant explained that due to the sale of notes to Grande, the money on the debts was due to Grande (1192). However, Clementine did not understand the principle of selling paper (1193).

D. A Wheel is Burned

Bruno testified that on the night-morning after the meeting at the Inn, the wheel of a truck owned by G. Zaffino was on fire (35). He did not know how the fire began. According to Bruno, several days later, appellant told him "they set [your] truck on fire and they would blow [your] shop off the face of the map" (58).*

Fire department records showed that it responded to the call before noon on July 17 (363-4) and that there was no suspicion of arson (363).

* Despite any absence of reference to gasoline in Bruno's testimony, the Assistant United States Attorney both in his opening and summation (1704) insisted there was.

The Government called Angelo Zaffino to testify about the reaction of Bruno and Clementine to the fire. He acknowledged he really had no recollection as to either (935, 948).

E. Payment of Debts Sold to Grande

1. Government Version

Money was given by the three Zaffino brothers to Clementine to pay the debts sold to Grande (67, 206, 506, 601, 602, 615).

A check for $5,000 dated August 10, 1970 (210), was made by Clementine to Galgano Realty Company (Government Exhibit 1) (71, 69, 206, 554). According to Clementine, appellant requested the check be made out to his company (555) and she gave it to appellant at her house in the presence of Leo (555).

On the contrary, Perone testified that he picked up the check and gave it to Grande (662, 727-8) at the Inn (729).

Then the telephone calls started again (554, 556). Clementine told the callers they'd have to wait, (556), and then, in one call, told them when to come for the second check (562).

A second check for $4,910 (597) in September, 1970 (593) was made out by Clementine (Government's Exhibit 2) (206,

208) to Galgano Realty Co. (72) and paid in the presence of appellant, Leo, Perone and Florenz (557, 399, 515).*

She testified these two checks were paid due to the threats (213).

2. Defense Version

According to appeallant about a week after the first meeting, Clementine called appellant to say she was making out a $5,000 check to him (1195). Unable to convince Clementine that the check should be made out to Grande, appellant told Clementine to make it out to Galgano Realty Co. (1197). Grande got the check and gave it to appellant to cash it (1197). The same procedure took place with the second $4,910 check (1199).

F. Payment of Judgments

Default judgment was entered on July 27, 1970 (1050) for $2,344.03 and on August 3, 1970, a second judgment was entered for $10,637.67 (1081). The Zaffinos learned of the judgments and arrangements were made through Castiglia and Silberkleit to pay the money (148,329)** thus, avoiding a levy on

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* This check was marked paid in full for various debts (Government's Exhibit 13 -16) and the $8,400 Barbara Galgano loan (634).

** Florenz testified that he could not remember the lawsuit, the judgment or the levy (417), and Bruno testified, that as of July 17, 1970, despite service of the summons on him, there were no legal proceedings against him (82, 422).

the G. Zaffino and Sons, Inc. bank account (1085). Bruno specifically testified these were paid due to the judgment and not due to the threats (213).*

All the checks paid on the judgments were drawn on the G. Zaffino account at the First National Bank of Westchester and were signed by Bruno and Angelo (147). They were:

Aug. 12, 1970	-	$3,000	(Ex. 3)
Aug. 20, 1970	-	500	(Ex. 4)
Aug. 26, 1970	-	500	(Ex. 5)
Sept. 3, 1970	-	500	(Ex. 6)
Sept. 15, 1970	-	500	(Ex. 7)
Sept. 24, 1970	-	500	(Ex. 8)
Oct. 15, 1970	-	500	(Ex. 9)

Two payments were missed (1209). Bruno came in with a $1,500 check to cover the missing payments and the next one (1209).

Subsequent payments were then missed, the G. Zaffino account was relevied and then Castiglia got a sheriff's check based on the levy (1093, 1209).

Appellant explained that he had no records of the loans because they were lost in his 1973 moves from New York to Florida and back (1142-3, 1322-5, 1327). He explained that he first became aware of the charges in March, 1975, when he

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* Despite this testimony from his own witness, the Assistant United States Attorney told the jurors that they could infer that the money due on the judgments was paid due to the threats (1708,1711).

was arrested (1325) and that while Agent Walsh had tried to reach him in 1971, he did not know the reason for the contact since when he advised Walsh that on advice of his lawyer he would not speak, Walsh never communicated with him.

As part of his challenge to appellant's credibility, the Assitant United States Attorney asked appellant a series of of questions about the lost business records (1225). The Assistant sought to ascertain that appellant was lying in Court, that his records would show that, and that appellant either purposefully lost them or was lying about them being lost (1231-1243, 1259-1262). The Assistant United States Attorney,taking advantage of the Government' delay in the case, argued in summation:

> . . . He testified that all his records were lost or all the records that involved this case. He made that determination. He just told his lawyer that he determined what records were relevant to this case and he told his lawyer those relevant records were lost.
>
> Perhaps, had he remembered in January who he had made the claim against or if he lost anything, his story could have been corroborated, because the Government has an obligation to put forth evidence against Mr. Galgano and it has an obligation, if they find evidence which exculpates Mr. Galgano, to make that available to counsel. So it's, indeed, unfortunate that his memory is so bad, even as to events of a few months ago.
>
> (1788).

G. Further Business

Bruno testified that after the debts were paid, he told everyone he could think of about the threats (290). But he did not tell any law enforcement official.

Bruno said that after the last payment in 1970, he did no further business with appellant and that during the payment period he did not see Galgano socially (78). Bruno especially denied requesting that appellant intercede on his behalf in February, 1972 (163), at the Union Savings Bank when that bank had denied Bruno's application for an extension of mortgage on Grace Church Street property.

However, John Morabito, a mortgage officer and Vice President of the bank testified that in January, 1971, there was an application by G. Zaffino and Sons, Inc. for an increase in the Grace Church Street property mortgage (1051). The application was denied (1052). A second application was made in April, 1971 (105-6) for G. Zaffino by appellant (1057) which was approved subject to assessment (1056).*

H. The Last Installment Payment

Bruno testified that he made a final cash payment in satisfaction of the debt (1499) to appellant, Leo and Grande on November 24, 1970, at the bank and that he obtained

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* Despite this testimony, the Assistant United States Attorney argued:

> There is no evidence before you whatever that any of these people had anything to do with Galgano after this incident.
>
> (1792).

the funds by cashing a certified check made out to cash which he signed (Government's Exhibit 11) (1486, 1489). Although his account had been levied upon and was therefore rendered unuseable, he said he got the money from borrowing from the bank (317) and paid it without getting a receipt (1489). The check stub reads "$6,347.13 . . . November 24, 1970, to Sheriff of the City of Westchester" (1492).

Bruno testified that this payment was not made due to threats, but because of the judgment (213).

Appellant denied this encounter (1210).

The record also shows that a payment of $6,000 was obtained by appellant's attorney from the Sheriff of Westchester County pursuant to the latter's execution of the levy (1635-6, 1641, 1638) and was sent to Castiglia.

I. Post-Evidence Motions

After the evidence was in, defense counsel renewed their motion to dismiss the indictment due to the pre-accusatory delay (1670). The motion was denied because of a lack of showing of prejudice (1672-5) with the Judge stating:

> . . . I have observed earlier, and I would be happy to observe at this time for the record, that I, as a public servant and a judge, regret, and I think it most unfortunate, that this case took as

long to come to trial as it did; and I think it was unnecessary for the executive branch of the Government to take as long as it did to develop the case, even after it heard about it, which was, of course, almost a year later than the events themselves, and the Government can't be chargeable for the time prior to its first learning of the case.

(673).

Point I

IT WAS ERROR TO DENY THE MOTION TO DISMISS THE INDICTMENT DUE TO PREACCUSATORY DELAY.

Prior to trial, defense counsel made a motion to dismiss the indictment due to preaccusatory delay. At the oral argument on the motion, counsel made clear his argument was premised on both the constitutional and the supervisory power of the court. The court denied the motion.

In United States v. Marion, 404 U.S. 307 (1971), the Supreme Court held that a preaccusatory delay, here three years,* in a criminal case was subject to challenge under the due-process clause of the Fifth Amendment. Two factors were important on consideration of the issues: whether the delay was an intentional one to gain a tactical advantage over the potential defendant or to harass him and, whether there was

*The acts charged occurred in July and August 1970; the FBI was contacted in September 1971, the United States Attorney's office received the first FBI report in January 1972, and the indictment was handed down in February 1975.

prejudice to the right to a fair trial (Id. at 325). Here, in deciding the defense motion to dismiss due to pre-indictment delay, Judge Lasker ruled that the Government behavior in this case was reprehensible, but refused to dismiss the indictment because it did not meet the tests of Marion.

A. The Reason for the Delay

The evidence revealed at the pre-trial hearing on the motion to dismiss was that three successive prosecutors had been assigned to handle this case. The first two did minimal work on the matter, only reviewing the files, conferring with the FBI Agent Walsh. Only one witness was interviewed and no documents were obtained. Although each prosecutor expressed the belief that the case was not ready for trial because it was not clear from the information in the hands of the Government what had occurred, both Assistant's simply put the case aside and for long periods did nothing with respect to it. They both acknowledged that if they had been more involved and given the case more supervision, it would have been moved forward in the process, but they asserted that other matters took precedence.

The third Assistant assigned to the case did nothing with it for seven months because he was too busy with other cases.

The action of the prosecutors was knowing and intentional. Their own testimony shows they deliberately put the case to the bottom of the pile because they had other matters to prepare. While there was nothing in the record to show that the Government set out with a goal of gaining a tactical advantage over the appellant, the prosecutor's office, including its supervisory staff, were charged with knowing the status of the case and could not insulate itself from the knowledge of the effect the delay might have had on the defense. Cf. Giglio v. United States, 405 U.S. 150, 154 (1972); Santobello v. New York, 404 U.S. 257, 262 (1971); United States v. Morell, slip op. 5873, 5882 (2d Cir. Doc. No. 74-1827, August 29, 1975). The reason for putting the case to the bottom seems to be that it was not very important. If the case was not important enough to process it should have been abandoned.

There was no testimony in the record that the failure of each of the Assistants to prepare this case was caused by understaffing in their office. However, even if such an implication is to be drawn from the evidence that they were engaged in other matters, understaffing cannot provide an excuse for the delay. Strunk v. United States, 412 U.S. 434, 436 (1973); Barker v. Wingo, 407 U.S. 514, 531 (1972); Dickey v. Florida,

398 U.S. 30, 37-8 (1970). See also United States v. DeLeo, 422 F.2d 487, 495 (D.C. Cir. 1970), where the Court speaks of the need for the Judges to provide a method for reallocating cases for their swifter completion. Cf. King v. United States, 265 F.2d 567, 569 (D.C. Cir.) cert. denied, U.S. (1959).

Although Strunk, Barker, and Dickey are cases involving the Sixth Amendment right to a speedy trial, they recognize the responsibility for a trial rests with the prosecutor and court, and abandon the requirement that oppressiveness be shown. The same standards should apply here. Indeed, since the potential accused has no way of controlling the process, as compared with an accused who can seek his speedy trial, the need for proper and uninterrupted processing of a case is even greater before charges are lodged.

B. Prejudice

Judge Lasker left for reconsideration at the conclusion of the evidence whether the death of Louis Ruggiero and the loss of appellant's papers were prejudicial to the defense case.

Judge Lasker assumed that Ruggiero would testify favorably to the prosecution. Such were the representations made by the Government about Ruggiero who was stated to be the source of information for the prosecution. Nevertheless, it is unknown what aid appellant could have received from witness.

> . . . With respect to actual prejudice to the appellants' ability to defend themselves, the record discloses that one eyewitness to the crime, a former codefendant, died before the case was eventually brought to trial. While it is true, as the Government argues, that the record does not indicate whether the testimony of this witness would have been helpful, or even available, to the appellants, we cannot gainsay that it would not have been. Certainly the death of a witness with firsthand knowledge of the events at issue creates the strong possibility of prejudice to a defendant.
>
> (United States v. Macino, 486 F.2d 750, 754 (7th Cir. 1973).

Appellant's lost papers were also critical in this case. As was generally acknowledged throughout the trial, the decision of the jurors became a matter of whose testimony they chose to believe. Not only was the defense case contrary to that of the Government, but Government witnesses presented inconsistent versions of their recollection of the events.

The defense, that there had been no threats by appellant and that Bruno had fabricated the story to get out of

his financial difficulties, was supported by the evidence that Bruno had control of G. Zaffino's books and records, that the three brothers were apparently unaware of the enormous debts incurred by Bruno, that the $15,000 mortgage on G. Zaffino property on Halstead Avenue was unauthorized by his brothers as was the $2,000 note on G. Zaffino, that after the alleged threats Bruno went to appellant for further assistance, and that appellant successfully used the judicial process to obtain payment of some of the money owed by Bruno.

Appellant explained that much of his testimony about the financial transactions was supported by his business records, but that most of them had been lost in the various moves he had made since the failure of his business. The loss of these papers occurred during the Government delay, at a time when, as appellant explained, he had no reason to believe they would be necessary, important, or of interest to the Government. As was aptly said by Mr. Justice Douglas in his concurring opinion in Marion:

> . . . The impairment of the ability to defend oneself may become acute because of delays in the pre-indictment stage. Those delays may result in the loss of alibi witnesses, the destruction of material evidence, and the blurring of memories. At least when a person has been accused of a specific crime, he can devote his powers of recall to the events surrounding the alleged occurrences. When there is no formal accusation, however, the State may proceed methodically to build its case while the prospective defendant proceeds to lose his.
>
> (United States v. Marion, 404 U.S. at 331)

See also Nickens v. United States, 323 F.2d 808, 813 (D.C. Cir. 1963).

While it is true that the legality of the obligations due to appellant was not challenged, his credibility was, and he was entitled to present the evidence which would establish his credibility. Furthermore, the records were also relevant to prove that appellant used the judicial process to gain the money due to him to rebut the claim of the Assistant United States Attorney, made in his opening, that appellant had not used the Courts but had resorted only to extortionate means of collecting the money. Furthermore, appellant was entitled to establish through his records, that he had sold his "paper" to Grande, especially in the face of Government assertions made in summation that appellant had not really disposed of claims but had only hired Grande and Leo to collect them.

Despite this prejudicial effect of the delay, the Assistant United States Attorney did not let matters rest, but proceeded to cross-examine appellant about the lost papers as to where he lost them, how he lost them, and the circumstances in which he lost them. Appellant, like the Government witnesses, had difficulty remembering due to passage of time and the circumstances of his travels. This examination had the further effect

of undermining his credibility before the jurors, causing them to disbelieve the appellant.

The prosecutor didn't leave matters there either: he pursued the lost papers again in his summation:

> . . . He testified that all his records were lost or all the records that involved this case. He made that determination. He just told his lawyer that he determined what records were relevant to this case and he told his lawyer those relevant records were lost.
>
> (1788)

This, even in summation, the prosecutor used the results of the Government causing delay to impeach appellant, and then even in light of recent cases from this Circuit reversing convictions because of Government suppression of evidence[(United States v. Seijo, slip op. 3039 (2d Cir. Doc. No. 74-2313, April 23, 1975; United States v. Badalamente, 507 F.2d 12 (2d Cir. 1974), cert. denied, 43 U.S.L.W. 3547 (1975); United States v. Sperling, 506 F.2d 1323 (2d Cir. 1974); United States v. Pacelli, 491 F.2d 1108 (2d Cir. 1973)] argued that the Government would have revealed any exculpatory evidence.* This was a final attempt to reduce appellant's credibility, this time contrasting his behavior with the Government's hypothetical conduct.

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* Ironically, Judge Lasker adjourned the trial in this case after the pre-trial motion because the Government was dilatory in turning over to the defense required documents.

C. Supervisory Power

The District Court should have dismissed this case in its supervisory power because of the casual, irresponsible manner in which this case was prepared by the Government. The prosecutor's failure to give the case the prompt attention it required is simply a way for the Government to circumvent the rules for prompt trials and the Speedy Trial Act of 1975 and cannot be permitted.

Conclusion

WHETHER ON CONSTITUTIONAL GROUNDS OR SUPERVISORY POWER THIS CONVICTION SHOULD BE REVERSED.

Respectfully submitted,

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Certificate of Service

16/10, 1975

I certify that a copy of this brief and appendix has been mailed to the United States Attorney for the Southern District of New York and to counsel for appellant Leo.

[signature]